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In the Supreme Court of the United States

OCTOBER TERM, 1968

EARL D. POLLOCK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Earl D. Pollock, Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 9, 1968.

OPINIONS BELOW

The opinion of the District Court (R. 47) is unreported, and is printed in Appendix "A" hereto, *infra*, p. App. 1. The opinion of the Circuit Court of Appeals, printed in Appendix "B" hereto, *infra*, p. App. 3 is reported in 21 AFTR(2) 1349.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 9, 1968; p. App. 13, Appendix "C" *infra*. Rehearing was denied on June 11, 1968, Appendix "G" p. App. 17. Mandate was stayed by the Circuit Court of Appeals on June 17, 1968, until July 16, 1968, Appendix "D", *infra* p. App. 14. Said mandate was stayed an additional 30 days on July 17, 1968, Appendix "E", *infra*, p. App. 15.

On July 23, 1968, Justice Thurgood Marshall extended the time to petition for certiorari to and including August 10, 1968 without prejudice, Appendix "F", *infra*, p. App. 16.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether defendant, charged with criminal tax evasion, should have been permitted to introduce documentary evidence showing:

(a) The accumulation of funds to finance foreign exports prior to period of indictment.

(b) The ownership of these funds by foreign distributors, not by defendant.

(c) Defendant's assumption of risk of loss of these funds before, during and after the period of indictment.

(d) Actual repayment of these funds to foreign distributors by defendant's employer pursuant to agreement with defendant, after the period of indictment.

STATUTE INVOLVED

26 U.S.C. 7201:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT

Defendant Pollock was an officer of Vilter International, Inc. He was in charge of foreign shipments of Vilter.

Commencing in 1945 appellant testified that he commenced to finance overseas shipments of Vilter. These financing arrangements extended from 1945 through January 10, 1962, when his employment was terminated.

Appellant, to expedite currency and import problems advanced his own funds to the overseas customers in order to permit the immediate fabrication of their orders by Vilter. For this accommodation he charged a modest interest. Pollock paid income tax on finance charges.

During the 1950s, a number of overseas customers kept their profit with appellant. Appellant testified that the profit left with him by overseas distributors was in excess of the amount of untaxed income claimed by the Government.

To facilitate advances and collections, appellant kept some of the funds with a Chicago freight forwarder, some on the books of the Vilter Company, and some in a bank account in Milwaukee.

Appellant attempted to show the entire history of his financing operation from 1945 through 1962. He further attempted to show that in a civil lawsuit involving Vilter Manufacturing Company funds of foreign distributors were recognized as such, and not as the private property of appellant.

Appellant engaged an experienced accountant to summarize all of his transactions with overseas dealers from 1945 through 1962. Exhibits 127, 128 & 129 constituting the summary were offered in evidence and rejected. (R. 487, 497, 503, 512)

The court below affirmed the ruling of the District Court on the ground that if the evidentiary exclusion was erroneous at all, it amounted to mere harmless error which had no effect on the substantial rights of Pollock. The court reasoned that Pollock's oral testimony covered the excluded exhibits. *United States* v. *Shavin,* 320 F.(2) 308 (7th Cir. 1963); *Ballantyne* v. *United States,* 293 F.(2) 112 (5th Cir. 1961).

REASONS FOR GRANTING THE WRIT

It is believed that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

The facts in this case are similar to those described in *Hanson* v. *United States*, 208 F.(2) 914, 916 (CA 6th Ohio, 1953).

In both cases there was a dispute as to the ownership of money. In both cases the Government attempted to deprive the defendants of the one explanation they had why the money claimed to be unreported income belonged to another.

The court below felt that defendant's oral testimony sufficed. Yet the Government produced *both* oral and documentary evidence. On this crucial point, Pollock was limited to oral testimony only. In a complex factual situation extending over many years the Government's advantage before the jury was heavily based on documents. Defendant's documents, rejected before the jury, were not available to counteract the Government's charts year by year.

The decision of the court below is believed to be erroneous and the conflicting decision in *Hanson* v. *United States*, *supra*, correct.

CONCLUSION

For the foregoing reasons the petition for the writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. BOWMAN,
Counsel for Petitioner.

August 9, 1968

APPENDIX A

Judgment and Commitment (Rev. 2-60) Cr. Form No. 25b

UNITED STATES DISTRICT COURT

For The

Eastern District of Wisconsin

UNITED STATES OF AMERICA

vs.

EARL D. POLLOCK

No. 64-CR-14

(Filed April 10, 1967)

On this 10th day of April, 1967 came the attorney for the government and the defendant appeared in person and by counsel, William Bowman and Frank McElligott.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty on January 31, 1967 of the offense of filing false and fraudulent joint income tax returns for the calendar years 1957, 1958, 1959, 1960 and 1961; in violation of Title 26 U. S. C. Section 7201, as charged in a five-count indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months and is fined the sum of Three Thousand Dollars ($3,000.00) on each of Counts 1, 2, 3, 4 and 5, said sentences as to imprisonment only to be served concurrently, making a total commitment of eighteen (18) months and a total fine of Fifteen Thousand Dollars ($15,000.00).

Execution of sentence is stayed pending appeal.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

John W. Reynolds
United States District Judge.
(By) Thomas A. Plein
Deputy Clerk.

(Signed) Ruth W. LaFave
Clerk.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 16352 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

UNITED STATES OF AMERICA
Plaintiff-Appellee
vs.
EARL D. POLLOCK
Defendant-Appellant

} Appeal from the United States District Court for the Eastern District of Wisconsin.

May 9, 1968

Before KNOCH, *Senior Circuit Judge*, SWYGERT, and CUMMINGS, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Earl D. Pollock appeals from a jury verdict finding him guilty of wilfully attempting to evade and defeat his federal income taxes for the years 1957 through 1961, in violation of INT. REV. CODE of 1954, § 7201.[1] The district court sentenced him to concurrent eighteen month terms of imprisonment on each count and fined him a total of $15,000. In seeking a reversal of his conviction, Pollock advances three contentions. First, he

[1] The indictment contained five counts, one for each year.

claims that the district judge unduly restricted the presentation of his defense by sustaining the Government's objections to several exhibits that he sought to offer in evidence. Second, he claims that he never constructively received the income upon which the Government alleged that he attempted to evade a tax. Third, he claims that "it was error to refer to a lay jury in a criminal prosecution complex and technical determinations heretofore reserved for the skill of the Secretary of the Treasury."

Pollock, an engineer and a lawyer, was employed by the Vilter Manufacturing Company of Milwaukee, Wisconsin. During the taxable years in question and for many years before, he served as Vilter's export manager. Vilter manufactured equipment used in industrial and commercial type refrigeration and air conditioning installations. While Pollock served as Vilter's export manager, the company's annual volume of export business increased from less than a hundred dollars to several hundred thousand dollars. According to Pollock's testimony, this increase in Vilter's export business was due to a particular method of financing export sales which he devised. Initially, a group of over sixty foreign distributors was built up through the assistance of United States commercial attaches overseas. Because of the burdensome import and currency restrictions imposed by foreign governments on prospective purchasers of Vilter equipment, Pollock decided that he could facilitate such purchases if he himself advanced the funds necessary for a given export order prior to its manufacture by Vilter. Vilter, which did not extend credit on sales to overseas purchasers, required that the price of the equipment be received before it would begin the necessary manufacturing and fabricating steps to fill an order.

After Pollock advanced the required funds and the equipment was ready to be shipped, the services of J. E. Bernard & Company, Inc., a freight forwarder and customs house collector located in Chicago, were employed. Bernard would advance the cost of freight, insurance, and handling and arrange all the documents necessary (export declaration, ocean bill of lading, etc.) to get the Vilter equipment on board ship and on its way to a particular distributor in a foreign country. Once the goods arrived in the foreign country, Bernard would be responsible for securing the permits and drafts necessary to collect the funds owed by the distributor.

According to Pollock's testimony, the amount thus collected by Bernard would usually be greater than the sale price (previously advanced by Pollock) that Vilter charged the distributor for the equipment. The added increment collected from the distributor would correspond to the "profit" that the distributor charged his customer for the Vilter equipment. From the total amount collected, Bernard would deduct the sums it had previously advanced for the freight and insurance plus its commission for performing these services. The remainder of the amount collected from a foreign distributor would be credited to an account at Bernard in the name of Manufacturers Export Company,[2] a sole proprietorship created by Pollock for the collection of funds remitted by the foreign distributors. The testimony disclosed that the disposition of the funds

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[2] Pollock testified that he did not disclose that *he was* Manufacturers Export because it was "very difficult to manage the issuance of credit when they knew the individual back of it." He also testified that he never informed anyone at Vilter (with the exception of a deceased credit manager) of his connection with Manufacturers Export because "the subject never came up.

held by Bernard in the Manufacturers Export account was subject to the sole and exclusive command of Pollock.

During the time covered by the indictment, Pollock directed Bernard to disburse some of the funds it held by checks to his order, to the order of other individuals he designated, and to the order of Manufacturers Export Company. He also requested Bernard to issue some checks payable to the Vilter Company.[3] Finally, Pollock ordered Bernard to disburse some of the funds back to the foreign distributors.

At the trial, the Government sought to prove its case against Pollock by means of the so-called "specific item" method. In so doing, it introduced specific checks written by Bernard and made payable to either Pollock or Manufacturers Export. Appearing on some of these checks were the endorsements of Pollock. A Government expert witness, aided by summaries introduced in evidence, computed the sums of these checks year by year and indicated the disposition of the funds. The witness then subtracted the amount of financing income reported by Pollock on his income tax return for a given year from the total he had received, and the remainder was what the Government claimed constituted unreported income. From this sum, the Government expert computed the additional income tax which Pollock owed but had not paid. In addition, the Government introduced evidence showing the money applied or spent by Pollock on nondeductible items during

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[3] Vilter, in turn, credited some of these funds to an account on its books in the name of Manufacturers Export. The money thus credited by Vilter apparently represented the return of funds which Pollock had previously advanced on a particular order. As a result, there existed a continually replenished source which Pollock could draw on to finance future orders.

the years in question. Some of these amounts were reflected in increases in various checking and savings accounts controlled by Pollock,[4] some were expended in the acquisition of several real estate parcels and the construction of several residential buildings, some were expended for boats, automobiles, life insurance, liquor, department store purchases, and a wedding reception. In determining how much was actually expended by Pollock from unreported income, the Government expert testified to a computation by which, from the total amount spent on nondeductible items in a given year, there was subtracted the nontaxable source of funds, the standard or itemized deduction, the allowable exemptions, and the taxable income reported. The expenditures from unreported income, thus computed, greatly exceeded the amount reported by Pollock as taxable income on his return for some of the years in question. Moreover, for each of the years in question, the expenditures from unreported income closely approximated the amount of Pollock's unreported income.

Pollock's principal defense was that the funds here in question collected by Bernard from the foreign distributors and in turn remitted to Pollock at his direction were not Pollock's funds, but rather were those of the foreign distributors. According to Pollock's testimony, the money he received from Bernard was the "profit" of a given foreign distributor on a particular sale of Vilter equipment which he was merely holding for the distributor at his request, "so that they would be better able to use it in the future." This so-called bailment or trust arrangement,

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[4] The evidence disclosed that the checks from Bernard to Pollock found their way into Pollock's personal checking account, his personal savings account, a Manufacturers Export checking account and a Manufacturers Export savings account. All of these accounts were in Milwaukee financial institutions.

whereby Pollock supposedly held the "profits" of various foreign distributors, was not evidenced by any kind of written agreement between the distributors and either Pollock or Manufacturers Export. Pollock did, however, introduce correspondence with one such distributor which indicated that he was in fact holding some money pursuant to the distributor's instruction.[5] He also introduced an exhibit from which he testified that during the period here in question, he was instructed to hold "profits" in excess of $300,000 which he claimed belonged to various distributors. In addition, he testified in detail concerning both the operation of this financing plan from its incipiency in 1946 and the movement of funds collected from the foreign distributors between Bernard, Vilter, and himself.

Pollock testified that he never failed to repay a distributor who requested the return of his, the distributor's, "profits" and that the distributors "had a prior claim" to both the money in his various bank accounts and the investments made with that money. He attempted to explain his expenditures on real estate, boats, and automobiles by testifying that as the funds in the checking and savings accounts subject to his control started to build up in 1957, he proceeded "to locate them in places where they would be readily available." He also claimed that the boats and automobiles were purchased for the entertainment of visiting foreign distributors although "they were also used for personal family use." The investment of the distributor's "profits" in real estate, according to Pollock, resulted from a decision that "it seemed a better procedure to have it located here at home where you knew exactly what could

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[5] Although Pollock testified that he frequently entertained foreign distributors when they were in Milwaukee, he failed either to call any of these distributors as witnesses or to introduce any depositions taken of them.

be managed by way of liquidating or of getting funds as soon as they were needed." On cross-examination, however, Pollock admitted that Manufacturers Export was not the co-owner of any of the property which he purchased. Likewise, there was no evidence that Pollock provided in any way for the recognition of the distributor's interest in this property.

Having thus summarized Pollock's involved business arrangements, we now consider the errors he advances for reversal. We reject Pollock's first contention that the district judge improperly restricted him in the presentation of his defense by ruling that certain of his proffered exhibits were inadmissible. The first group of exhibits, three in number, claimed by Pollock to have been improperly excluded were offered during the testimony of an accountant who had gone over Vilter's records at Pollock's request. One exhibit claimed to show the amount of checks issued by Bernard to Vilter between 1957 and 1961 which were charged by Vilter to the Manufacturers Export account on its books. Another exhibit purported to show a summary of the transactions in the Manufacturers Export account on Vilter's books between 1957 and 1961. Although each of the summaries prepared by Pollock's accountant reflecting these amounts was ruled inadmissible by the judge, the accountant was permitted, without objection, to testify to the figures appearing on these summaries. In addition, both Pollock and an officer of Bernard testified to the issuance of checks by Bernard to Vilter at Pollock's direction. The other exhibit was, in the words of the accountant, a "very tentative" list showing the distributors to whom "commissions" were due from Pollock over the five-year period. The accountant testified, "I never did make a complete, authoritative list of commissions due."